

No. 16197 ✓

United States
Court of Appeals
for the Ninth Circuit

J. M. DUNGAN, Trustee in Bankruptcy of the
Estate of Warren Elwood Scarbrough, Bank-
rupt, Appellant,
vs.

WARREN ELWOOD SCARBROUGH,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California, Southern Division

FILED

FEB 17 1959

PAUL P. O'BRIEN, CLERK

No. 16197

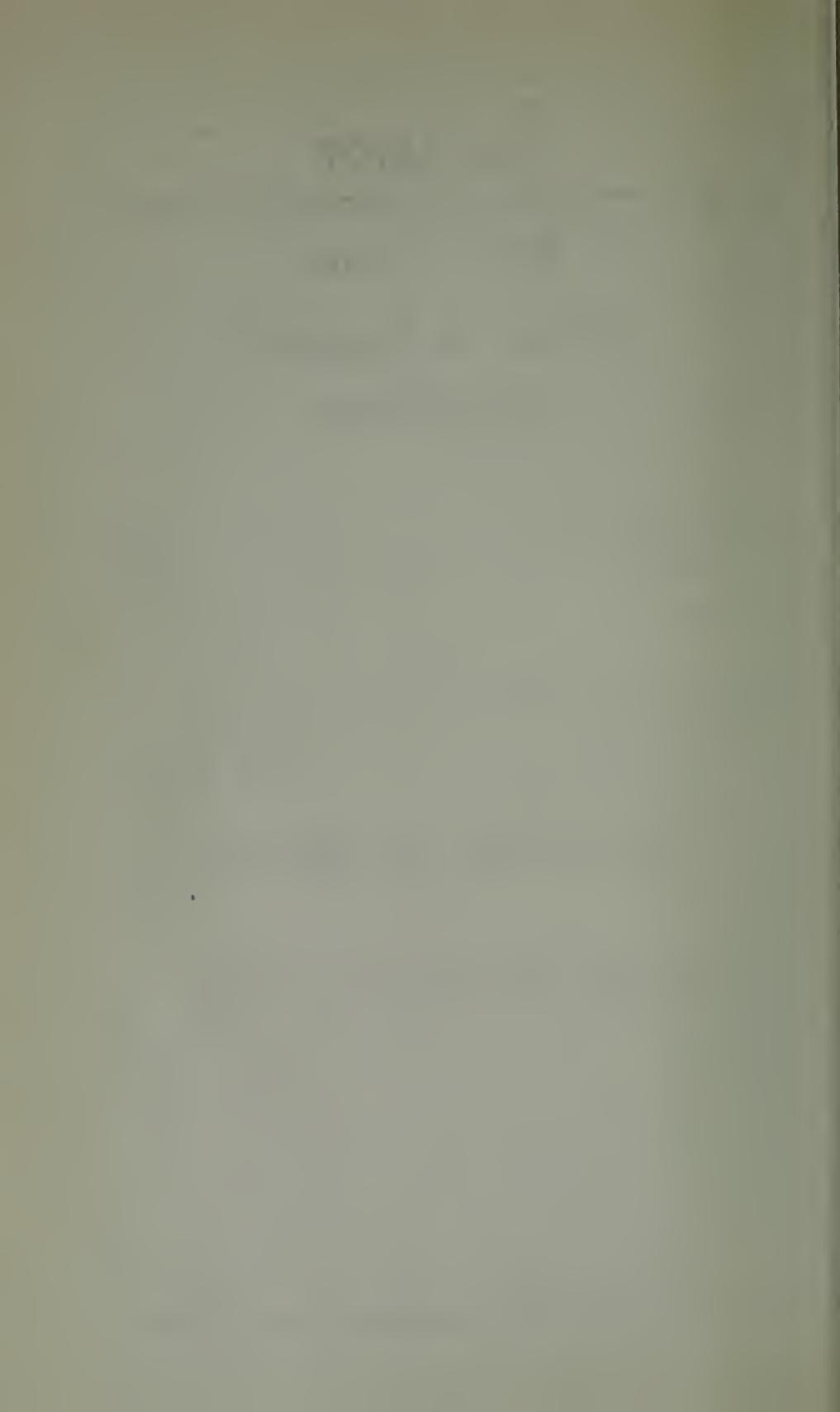
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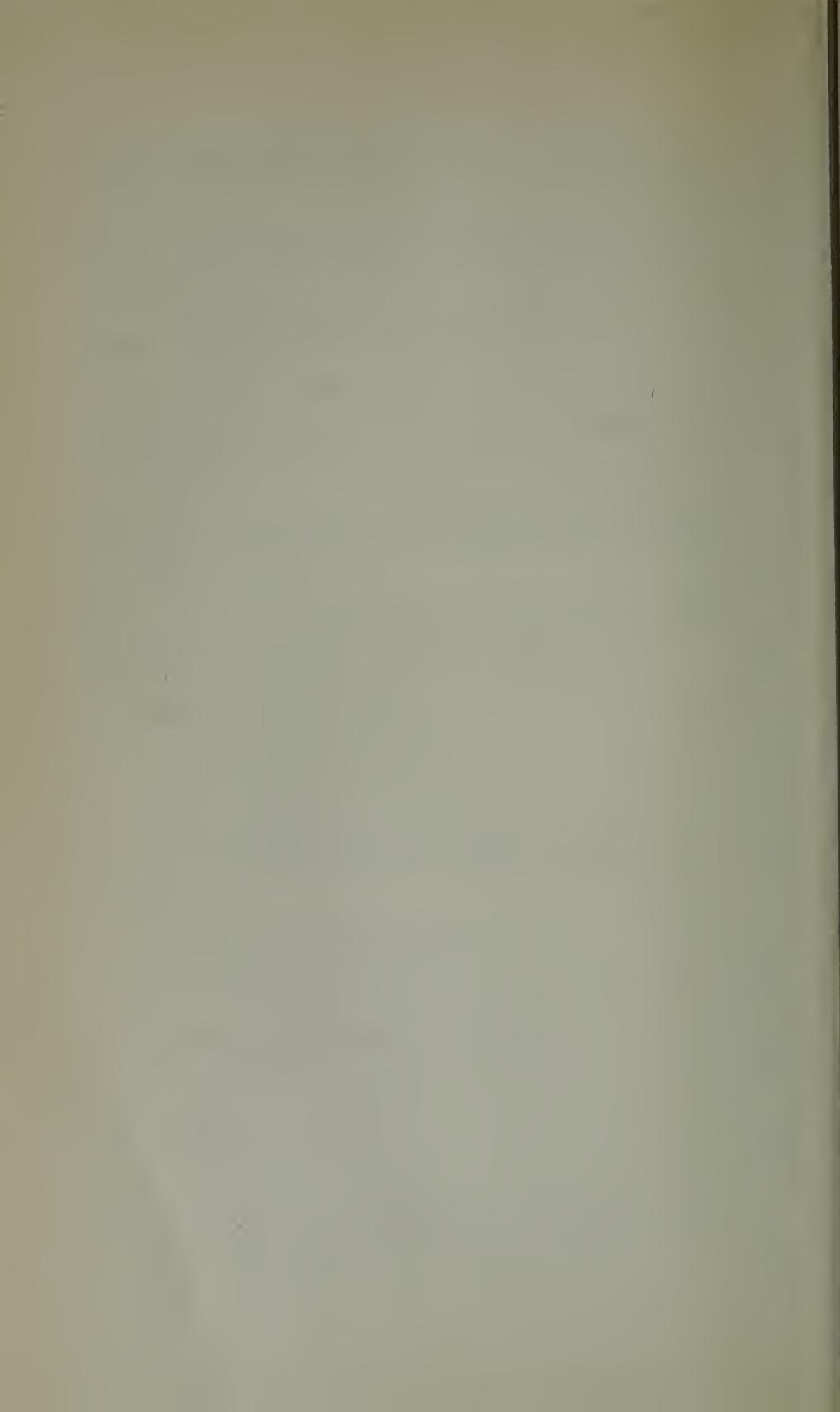


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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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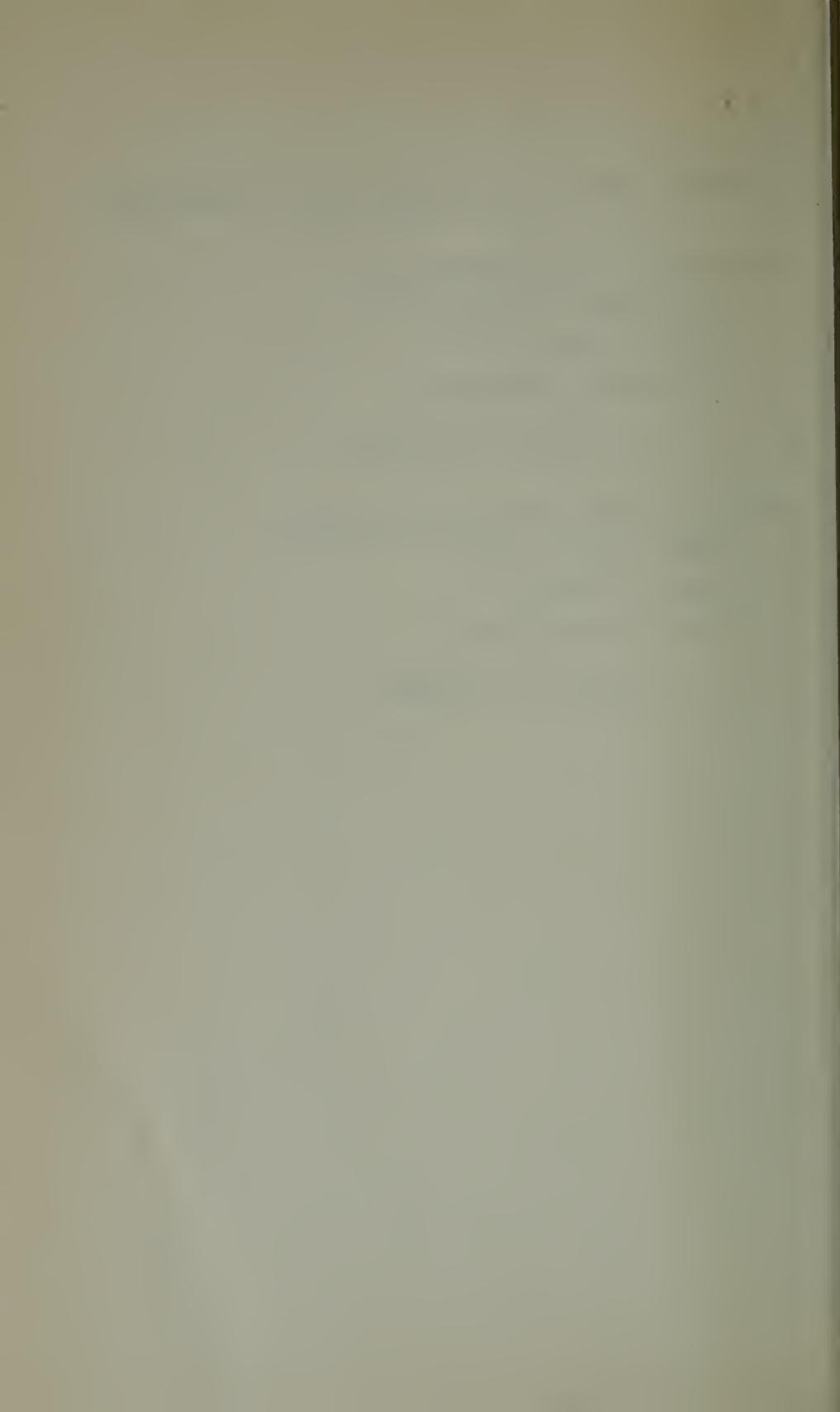
NAMES AND ADDRESSES OF ATTORNEYS

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United States District Court, Northern District
of California, Southern Division

No. 46588—In Bankruptcy

In the Matter of
WARREN ELWOOD SCARBROUGH,
Bankrupt.

**TRUSTEE'S PETITION FOR LEAVE
TO SELL REAL PROPERTY**

Comes now J. M. Dungan, and respectfully rep-
resents:

That he is the duly appointed, qualified and act-
ing Trustee of the estate of the Bankrupt above-
named.

That among the assets of said Bankrupt's estate
is an undivided one-half ($\frac{1}{2}$) interest in and to the
following described real property, situate, lying and
being in the County of Santa Cruz, State of Cali-
fornia, more particularly described as follows, viz:

Being Lot 18, as the same is shown upon the map
entitled, "Amended Map of W. H. Weeks Subdi-
vision of a part of the City of Watsonville," filed for
record in the Office of the County Recorder of said
Santa Cruz County February 23, 1905, in Map
Book 15, at page 2.

That on or about the 25th day of September, 1952
the above-named Bankrupt recorded in the office of
the County Recorder of said County of Santa Cruz
in Vol. 886, Page 141, of Official Records, a Declara-

tion of Homestead covering the premises above-described, but that said Bankrupt has waived his claim to exemption of his interest in said real property as above-described by his failure to claim his said interest therein exempt herein in his Schedule B-5 heretofore filed herein.

That the interest of said Bankrupt in the real property is reasonably worth approximately \$12,500.00 and is free and clear of all liens and encumbrances and that it would, therefore, be to the best interests of the above estate that the relief hereinafter prayed for be by this Court granted.

Wherefore, your Petitioner prays that due notice of the hearing of this Petition be given to the creditors herein, and that upon said hearing an Order be made authorizing your Petitioner to sell the interest of the above-named Bankrupt's estate in and to the real property hereinabove more particularly described at either public or private sale, and upon such additional notice, if any, as the Court may prescribe, subject to confirmation by this Court; and for such other, further and additional relief as to this Honorable Court may seem proper in the premises.

J. M. DUNGAN,
Trustee,
/s/ By ARTHUR P. SHAPRO,
One of his Attorneys.

Duly Verified.

[Endorsed]: Filed February 19, 1957.

[Title of District Court and Cause.]

APPOINTMENT—OATH AND REPORT
OF APPRAISER

Know All Men By These Presents:

It Is Ordered That C. H. Waller, be and he is hereby appointed Appraiser to appraise the real and personal property belonging to the estate of said bankrupt set out on the schedules now on file in this Court and report his appraisal to the Court, said appraisal to be made as soon as may be and the Appraiser duly sworn.

The fee for said Appraiser being hereby fixed at \$25.00 per day.

Witness my hand this 5th day of February, 1957.

/s/ BERNARD J. ABROTT,
Referee in Bankruptcy.

Northern District of California:

County of Monterey—ss.

Personally appeared the within C. H. Waller and made oath that he will fully and fairly appraise the aforesaid real property to the best of his skill and judgment.

/s/ C. H. WALLER.

Subscribed and sworn to before me this 5th day of February, 1957.

[Seal] /s/ EDNA BROYLES,
Notary Public in and for the County of Monterey,
State of California.

I, the undersigned, having been notified that I was appointed to estimate and appraise the real and personal property aforesaid and having attended to the duties assigned to me, and after a strict examination and careful inquiry, I do estimate and appraise the same as follows:

Real estate located at 410 Palm Ave., Watsonville. \$22,500.00.

In Witness Whereof, I have hereunto set my hand and seal this 5th day of February, 1957.

C. H. WALLER,
Appraiser.

[Endorsed]: Filed February 15, 1957.

[Title of District Court and Cause.]

ANSWER AND EXCEPTIONS TO TRUSTEE'S
PETITION FOR LEAVE TO SELL REAL
PROPERTY

The answer of Warren Elwood Scarbrough to the petition of J. M. Dungan for an order authorizing the sale of an undivided one-half ($\frac{1}{2}$) interest in that certain real property as described in said petition dated February 18, 1957 on file herein respectfully represents:

I.

That Warren Elwood Scarbrough, Bankrupt, on or about the 25th day of September 1952, recorded in the Office of the County Recorder of the County of Santa Cruz in Volume 886, Page 141, of Official

Records of said County a Declaration of Homestead covering the premises as described in said petition.

II.

That said Warren Elwood Scarbrough claimed an exemption of his interest in said real property in his Amended Schedule B-5 filed August 20, 1956 on file herein.

III.

That the interest of said Warren Elwood Scarbrough is reasonably worth less than \$12,500.00 and that it would be to the best interests of the above estate that the relief prayed for be denied.

Wherefore, respondent prays that the petition of the trustee be denied; and for such other, further and additional relief as may seem proper in the premises.

/s/ WARREN ELWOOD
SCARBROUGH,
Respondent.

/s/ PHILANDER BROOKS BEADLE,
Attorney for Respondent.

Duly Verified.

[Endorsed]: Filed March 7, 1957.

[Title of District Court and Cause.]

ORDER AUTHORIZING TRUSTEE'S SALE OF REAL PROPERTY

The duly verified Petition for leave to sell certain real property, more particularly therein and here-

inafter described, having regularly come on for hearing before the above-entitled Court on the 8th day of March, 1957, said Trustee being represented by Messrs. Shapro & Rothschild (Arthur P. Shapro, Esq., appearing), his attorneys, and the Bankrupt above-named having, by and through Philander Brooks Beadle, Esq., his attorney, filed herein his Answer and his exceptions to said Trustee's Petition for Leave to Sell Real Property; and evidence, both oral and documentary, having been adduced by the respective parties upon the issues so joined; and the matter having been duly argued and submitted to the Court for decision, and the Court being fully advised in the premises Finds

1. That at the time of the commencement of the above-entitled proceedings, said Bankrupt and Mary Scarbrough, his wife, were the owners, in joint tenancy, of the following described real property, situate, lying, and being in the County of Santa Cruz, State of California, viz:

Being Lot 18, as the same is shown upon the map entitled, "Amended Map of W. H. Weeks Subdivision of a part of the City of Watsonville," filed for record in the Office of the County Recorder of said Santa Cruz County February 23, 1905, in Map Book 15, at page 2.

2. That on or about the 25th day of September, 1952, the above-named Bankrupt recorded in the office of the County Recorder in said County of Santa Cruz, in Vol. 886 of Official Records, at p. 141, a Declaration of Homestead covering the prem-

ises above described; and that, by amendment to his Schedule B-5 herein made and allowed by this Court, under date of August 22, 1956, said Bankrupt claimed the above described premises exempt as a Homestead pursuant to the provisions of Section 1240 of the Civil Code of California.

3. That said real property was at the time of the commencement of the above-entitled proceedings, and still is, reasonably worth the sum of \$22,500.00.

Wherefrom the Court Concludes

1. That by virtue of the adjudication in Bankruptcy herein, J. M. Dungan, Trustee of the estate of the above-named Bankrupt acquired an undivided one-half interest in and to the above-described property as of the 10th day of May, 1956, and ever since has been, and still is, a tenant in common of said real property to that extent with said Mary Scarbrough, wife of said Bankrupt.

2. That, by virtue of his said Declaration of Homestead, both said Bankrupt and said Mary Scarbrough acquired an exemption therein to the extent of \$12,500.00, and no more, and that, therefore, the maximum exemption in said real property allowable to said Bankrupt is the sum of \$6,250.00; and

3. That the interest of said Bankrupt estate is reasonably worth the sum of \$11,250.00, subject to the said Homestead exemption of \$6,250.00.

And good cause appearing therefor,

It Is Hereby Ordered, Adjudged, and Decreed

that said Trustee be, and he is hereby authorized to sell the undivided one-half interest of said Bankrupt estate in and to the real property more particularly hereinabove described, at either public or private sale, and subject to confirmation by this Court, without further notice to creditors, provided that, within fifteen days from and after the date of entry of this Order said Bankrupt and/or said Mary Scarbrough, his wife, shall not have paid to said Trustee the sum of \$5,000.00 in full compensation for the non-exempt interest of said Bankrupt estate in and to said real property; and

It Is Further Ordered, Adjudged, and Decreed that if such payment of \$5,000.00 shall be so timely made to said Trustee, said Trustee shall convey to said wife of said Bankrupt all of the right, title, and interest of the above-named Bankrupt estate in and to said real property; or, in the event that such payment be not so timely made, as hereinabove provided, from the proceeds of said Trustee's sale of said one-half interest of said Bankrupt therein, there shall be paid to said Bankrupt by said Trustee, in full satisfaction of his said claim of exemption to said real property, the sum of \$6,250.00, and no more.

Dated: At San Jose, in said District, this 17th day of July, 1957.

/s/ BERNARD J. ABROTT,
Referee in Bankruptcy.

[Endorsed]: Filed July 17, 1957.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
PETITION FOR REVIEW

The Court being fully advised that the Bankrupt intends to file a petition for review of that certain order made and entered on July 17, 1957, pertaining to the homestead exemption claimed by the Bankrupt herein, and this being a proper case for the making of the order following, and good cause appearing therefor,

It Is Hereby Ordered that said Bankrupt shall have an extension of time within which to file said petition for review to and including August 9th, 1957.

Dated: July 25th, 1957.

/s/ BERNARD J. ABROTT,
Referee in Bankruptcy.

[Endorsed]: Filed July 25, 1957.

[Title of District Court and Cause.]

PETITION FOR REVIEW

To the Honorable Bernard J. Abrott, Referee in
Bankruptcy:

The petition of Warren Elwood Scarbrough re-
spectfully represents:

1. Your petitioner is the Bankrupt in the above entitled action and is aggrieved by the order herein of Bernard J. Abrott, Referee in Bankruptcy,

dated July 17, 1957, a copy of which order is annexed hereto, marked Exhibit "A," and made a part hereof.

2. Said order was and is erroneous in each of the following respects:

(a) Said order is against the law.

(b) The Referee, in making said order, erred by:

(1) Concluding that J. M. Dungan, Trustee of the estate of the above-named Bankrupt, acquired an undivided one-half interest [and became a tenant in common to that extent with Mary Scarbrough, wife of the Bankrupt] in the real property described as follows:

Real property, situate, lying, and being in the County of Santa Cruz, State of California, viz: Lot 18, as the same is shown upon the map entitled, "Amended Map of W. H. Weeks Subdivision of a part of the City of Watsonville," filed for record in the Office of the County Recorder of said Santa Cruz County February 23, 1905, in Map Book 15, at page 2.

(2) Concluding that by virtue of the Bankrupt's Declaration of Homestead both he and his wife, Mary Scarbrough, acquired an exemption to the extent of \$12,500.; that said exemption must be apportioned between them; and that therefore the maximum exemption in said real property allowable to the Bankrupt is the sum of \$6,250.

(3) Refusing to follow the California rule of law laid down in the case of *Strangman v. Duke* (1956), 140 C.A. 2d 185, wherein it was held that the Bank-

rupt's interest in the property, as against the Trustee in Bankruptcy, was exempt if the undivided interest was less than the amount of the statutory exemption.

Wherefore, your petitioner prays that your Honor prepare the record and certify to the Judge of this Court and transmit to the Clerk the record in the proceeding having to do with or in any manner bearing upon the order aforesaid, as provided in §39 of the Bankruptcy Act; that said order of said Referee be reviewed by a Judge of this Court in accordance with the provisions of the Act of Congress relating to Bankruptcy; that said order be reversed and set aside; that an order be made allowing the Bankrupt a Homestead exemption in the sum of \$12,500.; and for such other, further and different order as may be meet and just in the premises.

/s/ WARREN ELWOOD
SCARBROUGH,
Bankrupt.

PHILANDER BROOKS BEADLE,
JOHN T. TULLY,

/s/ By JOHN T. TULLY,

Attorneys for Petitioner.

Duly Verified.

[Note: Exhibit "A"—"Order Authorizing Trustee's Sale of Real Property," is the same as set out at pages 7-10.]

[Endorsed]: Filed August 5, 1957.

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON PETITION
FOR REVIEW OF ORDER AUTHORIZ-
ING TRUSTEE'S SALE OF REAL PROP-
ERTY

The undersigned, one of the Referees in Bank-
ruptcy to whom the above-entitled proceeding has
been duly referred, in accordance with the provi-
sions of Section 39(c) of the Bankruptcy Act,
hereby certifies as follows:

Statement of Proceedings

The above-entitled proceeding was commenced by
the filing of a petition for relief pursuant to the
provisions of Chapter XI of the Bankruptcy Act
on the 10th day of May, 1956; thereafter, and on
the 17th day of August, 1956, said petitioning
debtor was duly adjudged bankrupt herein and
J. M. Dungan, of Salinas, California, was duly
appointed and thereafter duly qualified as and still
is acting as Trustee of the estate of the above-
named bankrupt. Thereafter, said Trustee filed
herein his petition for leave to sell the bankrupt's
undivided one-half interest in and to the following
described real property, situate, lying and being in
the County of Santa Cruz, State of California:

Being Lot 18, as the same is shown upon the map
entitled, "Amended Map of W. H. Weeks Subdi-
vision of a part of the City of Watsonville," filed for
record in the Office of the County Recorder of said

Santa Cruz County February 23, 1905, in Map Book 15, at page 2.

On February 21, 1957, in accordance with the provisions of Section 58a(4) of the Bankruptcy Act, notice was given to the creditors by the undersigned Referee in Bankruptcy of the hearing of said Trustee's Petition for Leave to Sell Real Property. Said petition came on for hearing before the undersigned Referee in Bankruptcy on the 8th day of March, 1957, prior to which the above-named bankrupt had filed herein his Answer and Exceptions to said Trustee's petition. At said hearing, said bankrupt was personally present and represented by Philander Brooks Beadle, his attorney, and said Trustee was represented by Messrs. Shapro & Rothschild (Arthur P. Shapro, Esq., appearing), his attorneys. The facts with respect to the issues so joined were stipulated to by the parties in accordance with the pleadings, except that the Trustee withdrew his claim that the bankrupt had waived his claim to exemption of his interest to the above-described real property by his failure to claim same exempt in his Schedule B-5 theretofore filed herein, by reason of the fact that at the time of the filing of said Trustee's Petition for Leave to Sell Real Property, said Trustee had not been informed of the filing by said bankrupt on the 22nd day of August, 1956 of an amendment to his Schedule B-5 in which said bankrupt claimed his said interest in the above-described real property to be exempt pursuant to the provisions of Section 1240 of the Civil Code of California.

After partial oral argument by counsel for the respective parties upon the issues so joined, the matter was ordered submitted to the undersigned Referee in Bankruptcy for decision upon briefs to be filed by the respective parties. Said bankrupt filed herein his opening and reply brief and said Trustee filed herein his reply brief.

Thereafter, and after due consideration of the said issues involved, and of the records, papers, and files herein, the undersigned Referee in Bankruptcy made and filed herein the following Findings of Fact:

1. That at the time of the commencement of the above-entitled proceeding, said Bankrupt and Mary Scarbrough, his wife, were the owners, in joint tenancy of the following described real property, situated, lying, and being in the County of Santa Cruz, State of California, viz.:

Being Lot 18, as the same is shown upon the map entitled, "Amended Map of W. H. Weeks Subdivision of a part of the City of Watsonville," filed for record in the Office of the County Recorder of said Santa Cruz County February 23, 1905, in Map Book 15, at page 2.

2. That on or about the 25th day of September, 1952, the above-named Bankrupt recorded in the office of the County Recorder in said County of Santa Cruz, in Vol. 886 of Official Records, at p. 141, a Declaration of Homestead covering the premises above described; and that, by amendment to his Schedule B-5 herein made and allowed by this Court, under date of August 22, 1956, said Bank-

rupt claimed the above-described premises exempt as a Homestead pursuant to the provisions of Section 1240 of the Civil Code of California.

3. That said real property was at the time of the commencement of the above-entitled proceeding, and still is, reasonably worth the sum of \$22,500.00.

Wherefrom, the Court Concluded:

1. That by virtue of the adjudication in Bankruptcy herein, J. M. Dungan, Trustee of the estate of the above-named Bankrupt acquired an undivided one-half interest in and to the above-described property as of the 10th day of May, 1956, and ever since has been, and still is, a tenant in common of said real property to that extent with said Mary Scarbrough, wife of said Bankrupt.

2. That, by virtue of his said Declaration of Homestead, both said Bankrupt and said Mary Scarbrough acquired an exemption therein to the extent of \$12,500.00, and no more, and that, therefore, the maximum exemption to said real property allowable to said Bankrupt is the sum of \$6,250.00; and

3. That the interest of said Bankrupt estate is reasonably worth the sum of \$11,250.00, subject to the said Homestead exemption of \$6,250.00.

Opinion

In reaching the foregoing conclusions and in making that certain "Order Authorizing Trustee's Sale of Real Property" dated July 17, 1957, from which said order bankrupt timely filed the instant Petition for Review, the undersigned Referee in Bankruptcy

was primarily influenced by the decision of the United States Court of Appeals for the 9th Circuit in *Russell v. Laugharn*, 20 Fed. 2d 95, wherein, in a case on all fours with the case at bar the Court of Appeals held:

"as to homestead, where wife bought property paying on the purchase price \$2,000 of her separate money and \$5,500 of community funds and filed a declaration of homestead thereon, and afterwards became bankrupt, that the maximum homestead exemption of \$5,000 should be apportioned ratably to the two estates (husband's and wife's) so that the value of the property being the same as when bought, only one-third of her \$2,000 interest is subject to her debts; the community interest not being subject thereto."

In that decision, the Court of Appeals reviewed the applicable California law and cited numerous other cases in the California State Courts to like effect.

The undersigned Referee in Bankruptcy felt that, in the case at bar, the conveyance by the bankrupt to him and wife of the property, which was community property in the first place, created a gift (in the form of separate property) to the wife of what is now the other (her) undivided one-half interest in the above-described real property. The inability of the wife, legally, to declare a valid homestead upon the husband's interest alone in property held by them (as here) as joint tenants is supported by the decision of the California Supreme Court in

Estate of Davidson, 159 Cal. 98. See also California Civil Code Sec. 1239.

Dated at Oakland in said District this 6th day of May, 1958.

Respectfully submitted,

/s/ **BERNARD J. ABROTT,**
Referee in Bankruptcy.

Original Documents Transmitted
With This Certificate

1. Trustee's Petition for Leave to Sell Real Property.
2. Answer and Exceptions to Same.
3. Bankrupt's Opening Brief.
4. Trustee's Reply Brief.
5. Bankrupt's Reply Brief.
6. Order Authorizing Trustee's Sale of Real Property (dated July 17, 1957).
7. Order Extending Time to File Petition for Review (to August 9, 1957).
8. Petition for Review.
9. Bankrupt's Exhibit No. 3, Grant Deed Crossetti, et al. to Bankrupt.
10. Bankrupt's Exhibit No. 2, Declaration of Homestead.
11. Bankrupt's Exhibit No. 1, Joint Tenancy Deed from Bankrupt to Bankrupt and wife.
12. Appointment, Oath and Report of Appraiser (on real property at 410 Palm Avenue, Watsonville) dated February 5, 1957.

[Endorsed]: Filed May 7, 1958.

In the United States District Court, Northern
District of California, Southern Division

No. 46588

In the Matter of
WARREN ELWOOD SCARBROUGH,
Bankrupt.

ORDER VACATING ORDER OF REFEREE

The bankrupt petitions for review of an order by the Referee authorizing the Trustee of the bankrupt's estate to sell an undivided one-half interest in certain homesteaded property owned by the bankrupt and his wife in joint tenancy. In his order the Referee found the reasonable value of the homesteaded property to be \$22,500.00. He held that the bankrupt's declaration of homestead, in which the wife did not join, entitled the bankrupt and his wife to a combined exemption in the amount of \$12,500.00, and the bankrupt to a pro rata exemption of one-half that amount, or \$6,250.00. He therefore authorized the Trustee to sell the bankrupt's undivided interest in the property and to pay to the bankrupt the first \$6,250.00 of the proceeds in satisfaction of his exemption, unless within fifteen days the bankrupt or his wife paid the Trustee \$5,000.00 in compensation for the bankrupt's non-exempt interest.

In support of his order the Referee relied upon *Russell v. Laugharn*, 20 F.2d 95, a case decided by the Court of Appeals of this circuit in 1927. In that case, a bankruptcy proceeding against a wife, the Court found that certain property homesteaded by

the wife was in part her separate property and in part community property not subject to her debts, the interests of the community and the wife being undivided. The Court held that the homestead exemption should be ratably apportioned between the wife's interest and the community interest. No California decision was cited by the Court of Appeals as authority for its conclusion that the homestead exemption was apportionable.

Upon the present petition for review, the bankrupt relies upon a subsequent decision by the California District Court of Appeals, *Strangman v. Duke*, 140 C.A. 2d 185 (2d Dist. 1956), squarely holding that a husband who files a homestead declaration, in which his wife does not join, on property one-half of which is his wife's separate property and one-half of which is held in joint tenancy, is entitled to have the entire homestead exemption applied to his undivided one-fourth interest. The California court states in its decision that the homestead exemption provided by California law is not apportionable.

Thus, while the decision of the federal Court of Appeals in *Russell v. Laugharn* represented that Court's view of the California law at that time, it can no longer be applied in a situation where a California court has announced a different rule. The state courts, not the federal courts, are the final arbiters of the state law, and this is true even though the announcement of state law is made by an intermediate state appellate court. *Six Companies of California v. Joint Highway District No. 13*

of California, 311 U.S. 180 (1940); West v. American Telephone and Telegraph Co., 311 U.S. 223 (1940).

Thus Strangman v. Duke represents the California law to be applied in the present case. It is true that there is an earlier decision by the California District Court of Appeals in another District in *In re Rauer's Collection Co.*, 87 C.A. 2d 248 (1st Dist. 1948) which formulated a rule regarding the homestead exemption which seems different in principle from the rule announced in Strangman v. Duke.¹ But, *In re Rauer's Collection Co.*, differs from Strangman v. Duke and the present case on its facts in that there both husband and wife joined in the homestead declaration.

Strangman v. Duke, being factually the same as the present case, must be accepted as stating the applicable law. The Referee erred in failing to apply the California law as announced in that decision. His order authorizing the sale of the bankrupt's undivided one-half interest in the homesteaded property must be and is hereby vacated.

Dated: June 30, 1958.

/s/ LOUIS E. GOODMAN,
Chief Judge.

[Endorsed]: Filed June 30, 1958.

¹ In *In re Rauer's Collection Co.*, a husband and wife had joined in a homestead declaration on property held in joint tenancy. The Court held that the homestead exemption thus acquired should be applied against the entire property, and if it were sold for a sum in excess of the exemption, the husband's creditors could reach one-half of the excess.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that J. M. Dungan, the duly appointed, qualified and acting Trustee of the estate of the above-named Bankrupt, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final Order of the Honorable Louis E. Goodman, Chief Judge of the above-entitled Court, signed and filed on the 30th day of June, 1958 vacating the Order of Hon. Bernard J. Abrott, Referee in Bankruptcy, authorizing the Trustee's sale of certain real property dated and filed on the 17th day of July, 1957, and from the whole thereof.

Dated at San Francisco in said District this 7th day of August, 1958.

SHAPRO & ROTHSCHILD,
/s/ By ARTHUR P. SHAPRO,
Attorneys for J. M. Dungan, Trustee of the Estate
of Warren Elwood Scarbrough, Bankrupt.

[Endorsed]: Filed August 8, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, Southern Division, do hereby certify that the foregoing documents, listed below, are the originals filed in this Court in the above-entitled case and that

they constitute the record on appeal herein, as designated by the attorneys for the Appellant:

Extension of Time.

Order Vacating Order of Referee.

**Referee's Certificate on Petition for Review for
Sale of Real Property.**

Petition for Review.

Order Authorizing Trustee's Sale of Real Property.

Bankrupt's Reply Brief.

Trustee's Reply Brief.

Bankrupts Opening Brief.

Answer & Exceptions to Trustee's Petition.

Trustee's Petition for Leave to Sell Real Property.

Grant Deed to J. J. Crosetti.

Declaration of Homestead by Husband.

Joint Tenancy Deed.

Transcript on further Hearing to Show Cause.

Transcript on Motion to Dismiss Trustee's Petition.

Notice of Appeal.

Designation of Contents of Record on Appeal.

Order extending time to file petition for review.

Appointment, Oath, and Report of Appraiser.

In witness whereof, I have hereunto set my hand
and affixed the seal of said District Court this 22nd
day of September, 1958.

[Seal] C. W. CALBREATH,
Clerk.

/s/ By WM. J. FLINN,
Deputy Clerk.

In the Southern Division of the United States District Court, Northern District of California

In Bankruptcy—No. 46588

In the Matter of
WARREN ELWOOD SCARBROUGH,
Bankrupt.

FURTHER HEARING ON ORDER TO
SHOW CAUSE

Before Hon. Bernard J. Abrott, Referee in Bankruptcy, in Room A, Civic Auditorium.

San Jose, California—March 22, 1957

Appearances: Arthur P. Shapro, Esq., of the law firm of Shapro & Rothschild, 155 Montgomery Street, San Francisco, California. For the Trustee. P. B. Beadle, Esq., 1095 Market Street, San Francisco, California. For the Bankrupt.

The Court: Now, the Order to Show Cause in the Scarbrough matter; further hearing.

Mr. Shapro: Yes, on the petition for an order permitting the Trustee to sell certain personal property which consists of a tomato packing shed, located on the Southern Pacific Company property on West Lake Street in Salinas, free and clear of any interest or lien of Mrs. Scarbrough. In that matter Mrs. Scarbrough has filed an Answer in propria persona in which that issue is joined and on which we are prepared to proceed at this time.

Mr. Beadle: I might say it was filed in propria

persona because, Mr. Shapro, you thought that I might be disqualified.

The Court: I am not so sure that Mr. Shapro was alone in that; the Court made the suggestion here in front of your associate, Mr. Beadle. There is one major reason, and that is that the Bankrupt's attorney has the obligation to recover the maximum, as far as assets are concerned, for the benefit of all creditors, and the Bankrupt is not in a position to resist—other than for exemptions, which is proper. Consequently, how can the attorney for the Bankrupt, who has the obligation to recover assets for the benefit of creditors, resist an order to show cause where the Trustee is attempting to recover assets? I mean there is a conflict of interests. However, I did comment before, and if it wasn't clear I will comment again, that in the event Mrs. Scarbrough feels that she desires counsel, and if she came here under the impression [1]* that either you or your associate would be in a position to defend her rights and represent her, I will afford her an opportunity, by granting a continuance, for her to decide whether or not she should be represented.

Mr. Shapro: That is right. She has been very fair with me in all matters and I certainly don't want to take any advantage now—

Mr. Beadle: Because we realize that there is that protection due to her—How do you feel about that; Mr. Timmins was asked to be here—

* Page numbers appearing at top of page of Reporter's Transcript of Record.

The Court: Mrs. Scarbrough, this is entirely for your protection as far as you and I are concerned, and is said for your benefit. It is entirely possible in this meeting that matters might come up where you would need the protection of an attorney as far as you are concerned, and in the event you do proceed now without counsel—because as far as any attorney that is here now there is no one that I know of that is going to represent your interests and, as far as I am concerned, I will afford you an opportunity to obtain independent counsel, and will continue the hearing to give you that opportunity.

Mrs. Scarbrough: Would that be better?

The Court: I think it would, if you are going to testify under oath.

Mr. Beadle: I suggest that the matter go on today, and if anything does come up the hearing can be continued.

Mr. Shapro: I have no objection. [2]

The Court: Is that your wish, Mrs. Scarbrough?

Mrs. Scarbrough: Yes.

The Court: Proceed.

MRS. MARY SCARBROUGH

Being duly sworn by the Court, testified on behalf of the Trustee as follows:

Direct Examination

Q. (By the Court): Your first name, Mrs. Scarbrough, is Mary? A. Mary.

Q. And you are the wife of Warren Elwood Scarbrough, the Bankrupt in this matter?

(Testimony of Mrs. Mary Scarbrough.)

A. Yes, I am.

Mr. Shapro: Your Honor may recall that at a hearing in this matter when Mrs. Scarbrough was examined under 21A,—it was on January 4, 1957,—in connection with the general subject matter of this controversy, there were at that time here in court certain records of the Bankrupt which Mr. Scarbrough testified concerning. I asked him to have those records here again. Mr. Scarbrough, are those records here today?

Mr. Scarbrough: Yes, sir.

Mr. Shapro: Then I think, your Honor, that I can proceed briefly with Mrs. Scarbrough, and call Mr. Scarbrough after she has testified.

The Court: Very well.

Q. (By Mr. Shapro): Mrs. Scarbrough, on or about March 21, 1953 you advanced to the Ship Shape Packing Co. the sum of \$1,000.00?

A. Yes, I did. [3]

Q. And again on April 15, 1953 the further sum of \$4,000.00? A. Yes.

Q. And that money came, did it, from your own bank account? A. Yes, from my own savings.

Q. As I understand—correct me if I am wrong—the understanding between you and your husband at that time was that the \$5,000.00 would be used to purchased the shed we are talking about?

A. Yes,—for me.

Q. What, if anything, did you personally have to do with the negotiations for the purchase of this shed?

(Testimony of Mrs. Mary Scarbrough.)

A. I had nothing to do with it other than advancing the money; and there was a lapse of time due to one of the owners being in Europe—

Q. You don't know that of your own knowledge?

A. No, I don't.

Q. Please then—the question of delay will come up later; your husband will be able to testify about it because he knows. You did not have any negotiations? A. No.

Q. Your understanding was that your husband would purchase the shed with the four thousand and the one thousand that you gave him within those few days less than a month? A. Yes.

Q. When did you first learn that the shed had been purchased in your husband's name?

A. Well, I knew he purchased it but I thought a bill of sale had been made from—

Q. From him to you?

A. From him to me. [4]

Q. When did you first learn that there had been no bill of sale from him to you?

A. The last part of last year,—about October or November.

Q. That is, after his bankruptcy? A. Yes.

Q. Now, the shed at the time of its purchase was located at the same place of business?

A. Oh, yes.

Q. Do you know from whom it was purchased? If you don't know, we have the bill of sale here.

A. No, I don't remember.

Q. Do you know, Mrs. Scarbrough, that under

(Testimony of Mrs. Mary Scarbrough.)

date of May 1, 1953 a lease of the Southern Pacific property on which this shed is located, was made by the Southern Pacific to your husband, doing business as Ship Shape Packing Co.? A. Yes.

Q. Now, your Answer alleges that \$400.00 in rent was collected for the year 1953 by you. Is that right?

A. Yes.

Q. What was the arrangement as to the amount of rent that was to be paid by your husband for his use of this shed as far as you are concerned?

A. Well, I don't remember exactly what it was supposed to cover, length of time, or how to be paid. I just remember that they gave me \$400.00 in rent.

Q. Do you know for what period of time that \$400.00 was supposed to cover?

A. No; I know their ledger shows they owed me more rent.

Q. I presume the ledger is here? A. Yes.

Q. Your Answer also alleges that you expended \$755.86 in connection with the property in reliance of the belief that you [5] owned it. What are the items comprising the \$755.00?

A. On July 17th, 1956 I spent \$195.25 for insurance; on May 15th, 1956 I paid the Southern Pacific Railroad \$120.00; on June 4th, 1956 I paid Peterson and Traulsen \$52.23; on May 23rd, 1956 I paid H. A. Hyde & Co. \$16.18, on which \$6.25 only went for weed killer for around the shed; on June 20th, 1956 I paid \$9.80 to Hansen Lumber Co. for lumber or supplies; on June 29th, 1956 I made a check to H. A. Hyde & Co. for \$12.36, of which

(Testimony of Mrs. Mary Scarbrough.)

\$4.83 only went for—I suppose weed-killer for the shed. On July 10th, 1956 I paid Harrison's Color Corner \$7.23 for paint; on April 20th, 1956 I paid Harrison's Color Corner \$9.34 for a paint brush for the shed; on April 27th, 1956 I paid Hansen Lumber Co. \$154.42 for either glass or lumber for the shed; on April 28th, 1956 I paid Anthony Greco \$12.00 for labor he did around the shed; on May 8th, 1956 I paid Goodman Lumber Co. \$90.95, and I had previously given them \$20.00 on account of some linoleum tile for the shed office floor.

Q. Is the total payment \$110.95?

A. Yes; \$90.95 plus \$20.00.

On April 11th, 1956 I paid H. A. Hyde & Co. \$53.56 for spray for the shed, and on July 16th, 1956 I paid to W. E. Scarbrough \$20.00 and he was in turn to give this money to Frank Cox for labor he did in hauling away trash from the shed.

Q. I haven't added it, but is the total \$755.00
Mrs. Scarbrough? A. Yes.

Mr. Shapro: I have no further questions of this witness. Is there anything she wants to testify to on her own behalf? [6]

The Court: Mrs. Scarbrough, Mr. Shapro has concluded his examination of the questions he desired to ask you. Now, he is asking you whether you desire to volunteer any statements on your own behalf?

Mrs. Scarbrough: Well, I have Mr. Timmins,—he is the accountant,—and of course I could say I saw in the general ledger—

(Testimony of Mrs. Mary Scarbrough.)

Q. The general ledger would show—

A. Well, I paid that \$5,000.00 for the shed,—I gave them the money for that.

The Court: That is all. Thank you very much.

WARREN ELWOOD SCARBROUGH

Being duly sworn by the Court, testified on behalf of the Trustee as follows:

Direct Examination

Q. (By the Court): Your name is Warren Elwood Scarbrough? A. Yes.

Q. And you are the Bankrupt in these proceedings? A. Yes, sir.

Q. (By Mr. Shapro): Mr. Scarbrough, I show you a document called Bill of Sale, which is dated May 5, 1953 from Salinas Valley Ice Company, in favor of W. E. Scarbrough, and ask you if, after having examined it, that is the Bill of Sale you received after you procured the sum of \$5,000.00 for the tomato shed that we are talking about?

A. Correct, sir.

Mr. Shapro: We will offer the Bill of Sale, your Honor, as Trustee's Exhibit No. 1.

The Court: No. 1,—on the Order to Show Cause.

Q. (By Mr. Shapro): Now, Mr. Scarbrough, was the \$5,000.00 paid in one lump sum to the sellers? A. Yes, sir.

Q. And whose check was this?

A. The check of Ship Shape Company,—\$5,000.00 to the Salinas Valley Ice Company.

(Testimony of Warren Elwood Scarbrough.)

Q. Dated when? A. July 20, 1953.

Q. And was Ship Shape at that time a partnership, or was it your own business?

A. A partnership.

Q. A partnership consisting of you and Mr. Gildersleeve? A. Correct.

Q. That partnership was subsequently dissolved, the assets being acquired by you, and the obligations being assumed by you; correct?

A. That is correct.

Q. Now, when did you receive,—when I say "you" I am referring to Ship Shape—the \$1,000.00 concerning which Mrs. Scarbrough has testified?

A. When did we receive that?

Q. Yes. If you don't know of your own knowledge— A. I don't know the date.

Q. We will get it from Mr. Timmins later. Do you know when Ship Shape received the \$4,000.00?

A. No, sir.

Q. You do know it was received in those two sums? A. Yes.

Q. Do you know to whom the checks for the four thousand and the one thousand dollars were made payable to?

A. They were made payable,—no, I can't say for sure.

Q. Mrs. Scarbrough, do you happen to have those two checks with you?

Mrs. Scarbrough: No, I don't. The \$4,000.00 check is a [8] Bank of America cashier's check, and

(Testimony of Warren Elwood Scarbrough.)
they wouldn't look it up—wouldn't give it to me;
they checked it.

Q. Mr. Scarbrough, it is a fact that those two checks, one for \$4,000.00 and one for \$1,000.00, whether cashier's checks or your wife's checks, were deposited in the bank account of Ship Shape Company?

A. That is correct, and given to the company.

Q. And neither you nor the company executed a bill of sale or any other instrument in writing purporting to convey title to this shed to Mrs. Scarbrough? A. No, never did.

Q. Now, Mrs. Scarbrough made some mention of the reason for the delay in delivering the bill of sale, referring to the fact that it is dated May 5th and you didn't pay the money until July and didn't receive the bill of sale until December?

A. Correct.

Q. What was the reason?

A. Mrs. Myers,—the widow of Ralph Myers,—was in Europe on a vacation; the sale was agreed upon and it was handled by Mr. Matthews of the Union Ice Company, and we had to wait until her return.

Q. The Trustee's copy of the bill of sale indicates the signatures of Ivy Myers and Ivan Thomas Myers, and is dated December 23, 1953. Are you familiar with the books of account of the Ship Shape Company?

A. No, I am not familiar with the bookkeeping.

Q. You have had no experience in accounting

(Testimony of Warren Elwood Scarbrough.)
matters? A. Oh, no. [9]

Mr. Shapro: Then, your Honor, I have no further questions of Mr. Scarbrough, and if Mrs. Scarbrough has any cross examination—

The Court: Mrs. Scarbrough, you heard Mr. Scarbrough's answers to the questions asked by Mr. Shapro. In addition to the questions you have just heard, is there any question you wish to ask Mr. Scarbrough with reference to this transaction concerning you; any particular point that you wish to bring out?

Mrs. Scarbrough: Well, I could bring out the point about not receiving the bill of sale from them—and it seems in a way so ridiculous, the way they were handling it. But on the other hand, I wish to say I advanced the Ship Shape Company on February 26th, 1953 \$10,000.00; I received from them nothing in writing to show I ever gave them that money,—it was just in the books. Then on April 11th, 1955 I advanced \$6,049.55 to them for U. S. Treasury bonds, and I have the withdrawals—I have the bank receipts on those, but I received nothing from them in writing to indicate I paid them other than what is in the books. On February 24th, 1956 I advanced and paid for them to the California Department of Employment \$2,190.76. I have received nothing from Ship Shape to indicate I had made the payment except how it was handled in the books.

Mr. Shapro: For the sake of the record I am going to object to all the last testimony on the

(Testimony of Warren Elwood Scarbrough.)
ground that it is incompetent, irrelevant and immaterial. I don't believe it is [10] material because the irregularity of the transactions between the parties has no legal bearing, but for the record I object to it.

Mr. Shapro: I see you have here, Mrs. Scarbrough, Mr. Timmins, an accountant employed by you—

A. No, I met Mr. Timmins today for the first time; I had never met him before.

Q. Now, if you have some evidence you want to bring out from him as your witness I suggest you do so, because, subject to our right to cross-examine, the Trustee will close his case.

The Court: Mrs. Scarbrough, that means that on behalf of the Trustee, Mr. Shapro has completed his case, as far as the Trustee is concerned. If you desire to call anyone as your witness, you may.

Mrs. Scarbrough: Yes, I wish to call Mr. Timmins.

LOUIS TIMMINS

being duly sworn by the Court, testified on behalf of the Respondent as follows:

Direct Examination

Q. (By The Court): What is your full name?

A. Louis Timmins.

Q. Mr. Timmins, what is your occupation?

A. I am a public accountant.

Q. Did you have some connection with either

(Testimony of Louis Timmins.)

Mr. or Mrs. Scarbrough, or the Ship Shape Packing Company?

A. I was retained by the Ship Shape Packing Company as accountant at the time the partnership was first formed. I performed [11] that service for them for several years, it may be two or three years.

Q. Can you tell me when you terminated your connection with either Mr. Scarbrough or Ship Shape Packing Company?

A. I believe it would be approximately--the books would show.

Q. Well, you can look at the books.

A. It would be at the close of their fiscal year, March 31, 1954, after completing the tax return for that period there was no longer—

Q. Since that time you have had nothing to do with the books? A. That is true.

The Court: Mrs. Scarbrough?

Q. (By Mrs. Scarbrough): Well, I would like Mr. Timmins, inasmuch as he handled it at the time, to explain how the transaction was handled in the books,—where it shows in the books that the shed is mine; where it shows in the ledger that they paid rent, and where they have a journal entry or something—as I say, I am not familiar with the books—showing that rent was due to me, and the books as they were originally.

The Court: This transaction originally commenced with this item—

Mr. Shapro: May 1, 1953.

(Testimony of Louis Timmins.)

Q. (By The Court): Mr. Timmins, will you examine the books and tell us what this original entry shows with reference to the transaction of Mrs. Scarbrough and Mr. Scarbrough,—this one controversy here with reference to the shed? [12]

Mr. Shapro: You will have to go back to March, I am sorry,—I said "May." Please don't refer to anything else but the books in giving testimony.

Mr. Timmins: I am sorry. I wrote that letter myself. On April 16, 1953, \$4,000.00 was received in a deposit made that day at the bank, which was credited to an account set up as loan payable to Mary Scarbrough.

Q. April 16, 1953, \$4,000.00?

A. That's right. On July 20, 1953 a check was issued to the Salinas Valley Ice Company for \$5,000.00, and this check was posted as a payment for the tomato shed which is in question, which was—

Mrs. Scarbrough: Mr. Timmins—

Mr. Shapro: Excuse me, you will have to let him testify—

Mr. Timmins: —that was in full payment. On November 27, 1953 there was a further deposit—or included in that deposit was \$1,000.00 which was described as "Received from Mary Scarbrough to apply on the tomato shed".

Q. That was in November? A. November.

Q. Would you look at the cash deposits on or about March 21, 1953 and see if you have a thousand-dollar deposit?

(Testimony of Louis Timmins.)

A. There is no such deposit.

Q. There was evidence of one here, this last time. Do you have the deposits with you, Mr. Scarbrough?

Mr. Scarbrough: No, sir.

Q. You had them here the last time?

Mr. Scarbrough: Oh, yes, they are in the car, it will take [13] me but a second to get them; they are in a box.

Mr. Timmins: Do you want me to wait?

The Court: Are there some other transactions reflected in the books of the Ship Shape Company?

Mr. Timmins: Yes, one more transaction which will complete it.

The Court: Fine.

Mr. Timmins: On November 27th again there was a book entry made in which the amount of the deposit of April 16th, 1953 which was credited to a loan payable account was reversed and taken out of the loan payable.

Q. This is a journal entry?

A. Similar to a journal entry; it was made in the book here, but it is similar.

Q. November 27th, 1953?

A. November 27th, 1953—that is equivalent to a journal entry, in which \$4,000.00 was transferred out of the loan account and entered as a credit to the tomato shed account, and the explanation given on that was that the balance of the money advanced by Mary Scarbrough applied in liquidation of the loan from her; it was the intention—

(Testimony of Louis Timmins.)

Mr. Shapro: "intention", sir—I object; it is what the books show.

Q. Now, other than the so-called journal entry, what other entry in the books was made of the thousand-dollar deposit on November 27, 1953?

A. Outside of the book, you asked?

Q. Outside of the entry you just read. In other words, you [14] testified that the cash record shows \$1,000.00 received from Mary Scarbrough on November 27th? A. That is true.

Q. And the journal entry shows that the \$1,000.00 was to apply on the tomato shed account of \$4,000.00? A. That is true.

Q. Was there any other entry made concerning the \$1,000.00 of November 27th?

A. I am sure that there was none.

Q. Then between April 16th, 1953 and November 27th, 1953 the \$4,000.00 was carried on the books of the Ship Shape Company as a loan from Mary Scarbrough? A. That is true.

Q. Can you tell from the books whether at all times between April 16th and November 27th, 1953 the bank account was in excess of \$4,000.00?

A. I can tell,—it would take a little time to do it.

Q. I am afraid we are going to have to find out.

A. Because the books of the company were not closed out at the end of each month—in this particular type of bookkeeping we tabulate all checks, the total checks we have to deposit as of that date, and then subtract.

(Testimony of Louis Timmins.)

Q. Can you look at any particular place between those dates of April 16th and November 27th and see whether or not there was any such total, and give us a balance which, if any, is less than \$4,000.00 at any time during that period?

A. Well, from a quick look at the books I can find that there was one place right at the very beginning of that place where the bank balance was less than \$4,000.00.

Q. The date of that, sir?

A. April 29th, 1953. [15]

Q. That is all I want to know on that score at the moment. Now, will you look at the deposit slips, Mr. Timmins, for Ship Shape Packing Company for that date—about March 21, 1953?

A. I have a date here that is close to that date.

Q. You don't have any, do you, here?

A. I don't have any on March 21st,—there were deposits close to that date.

Q. Let me look: There was one that Mr. Scarbrough had which showed a deposit of \$1,000.00 on that date. The reason I am going into that is that he testified the thousand dollars was paid in March, not November.

A. There is '52; you can go on from that.

Q. Let's see the November 27th deposit slip?

A. '53?

Q. Yes.

A. There was at one time two deposit books being used. Are these all of them, Mr. Scarbrough?

Mr. Shapro: My recollection is, Mr. Scarbrough,

(Testimony of Louis Timmins.)

that when you were here before, in January, you had duplicates on white paper, not on yellow.

Mr. Scarbrough: These are the only records Ship Shape ever had; they were in yellow.

Q. They were in yellow, were they?

Mr. Scarbrough: Yes.

Mr. Timmins: It is my recollection, when I began looking up information to write the letter I wrote, that there was information which I was unable to find. Now these are deposits—on this side (indicating). [16]

Q. (By Mr. Shapro): Let's go to November.

A. November 27th—the 21st will be the other way, of course; this would indicate that there were no deposits in the month of March, other than March 24th, 25th, and 31st.

Q. That's true. Then, your Honor, may I ask Mr. Scarbrough a question?

The Court: Yes, certainly.

Q. (By Mr. Shapro): Mr. Scarbrough, when did you receive the thousand dollars as distinguished from the \$4,000.00 from Mrs. Scarbrough, on this tomato shed?

A. I don't recall. Do you have that in the records?

Mr. Shapro: That's just the point; the witness has testified that the thousand dollars was received on November 27th the books show; Mrs. Scarbrough testified it was April 21st; her Answer says March 21st, and you both testified on January 4th, 1957 that it was on March 21st.

(Testimony of Louis Timmins.)

Q. Do you have an account there, Mr. Timmins, for Mr. Scarbrough? A. Yes.

Q. Is this the only account of Mr. Scarbrough in these books?

A. I believe it was, unless there was a withdrawal—but I don't believe there was such.

Q. Now, where is the Mary Scarbrough account?

A. Mary Scarbrough; I see there was set up two pages; this is the one originally set up. That shows the four-thousand-dollar payment by her.

Mr. Shapro: May the record show that the general ledger, [17] under loans payable, Mary Scarbrough, shows under date of November 27, 1953 the following entry: Liquidation loan tomato shed purchase; the post reference is cr5—which, (addressing the witness) was the cash record?

A. That's true.

Q. \$4,000.00 is a debit to the loan payable account; right? A. Yes.

Q. That is the result of the journal entry that you identified previously?

A. That is true; I was going to show you the entry,—here it is, right here.

Q. Will you show where the account was credited with the four thousand—?

A. Right here. (Indicating on book.)

Mr. Shapro: The same ledger sheet, under date of April 16, 1953, and with the posting reference "cl" shows a credit to that account of \$4,000.00. I have no further questions.

The Court: Mrs. Scarbrough, do you have anything?

(Testimony of Louis Timmins.)

Mrs. Scarbrough: I haven't anything if I don't recall how I gave it to him; I know I gave the one thousand on March 21st—I found this check—I don't know if I gave it in cash or how, but I gave it to him in March; how it was credited on the books, or when it was credited on the books, that I don't know; but on March 21st I gave him a thousand, and four thousand was in April; then I never questioned what they did with it other than that the shed was purchased for me, and so they could use it they were to pay me rent. And Mr. Timmins—Will you look up in the records where they owed me rent, and where they made reference to the fact that that shed was mine?

Mr. Shapro: I will have to ask to strike the last part as the conclusion of the Respondent.

The Court: So ordered. The question she asked was: What do the books show with respect to rent paid on the shed?

Mrs. Scarbrough: I found it: "10/31/55".

Mr. Timmins: This part of the ledger was subsequent to the time, as you can see from the handwriting.

Q. (By Mr. Shapro): You didn't make the entries that you are now referring to?

A. This wasn't made by me, but—

Mrs. Scarbrough: What—

(Mrs. Scarbrough admonished by the Court.)

Q. (By The Court): Mr. Timmins, were you going to make a statement with reference to what the books show on the rental?

(Testimony of Louis Timmins.)

A. Yes. Subsequent to this I found a place where the rentals were paid, apparently, by cash.

Q. (By Mr. Shapro): That was the four hundred dollar item?

A. The four hundred dollar item—I would have to look that up, but I am certain it was.

Q. From your records there is no indication of where or what period it was paid to? A. No.

Q. Will you find in this book which Mrs. Scarbrough has called to your attention—and before you do so, what is the book?

A. This is the general journal; page 12.

Q. The date?

A. The date it is marked here is "10/31/55 as of April '55" which means correcting entries on page 12 of the general journal there is an entry which debits interests expenses [19] \$666.70 and debits rent \$1500.00, and credits Mary Scarbrough with \$2,166.70, the sum of those two amounts.

Q. Will you look at the Mary Scarbrough account and see whether she received that in cash or whether it was merely a credit to her loan account?

A. That amount of \$2,166.70 was a credit to her loan account.

Mr. Shapro: That is all.

Q. (By Mrs. Scarbrough): Then there is another entry, 12/31/55 J1; it said—

Mr. Timmins: This has nothing to do with rent.

Q. (By Mrs. Scarbrough): Yes, there is one that has to do with rent there.

(Testimony of Louis Timmins.)

A. On December 31, 1955, recorded in the general journal—there is no page number, but it follows two pages after Page No. 14—there is an entry which debits rents \$750.00 and debits interests \$283.34, and credits Mary Scarbrough \$1033.34 with the explanation: “To set up balance of shed; rental at \$250.00 and interest.”

Q. Now, look at Mary Scarbrough’s account and tell us whether that was paid to her in cash or credited?

A. \$1033.34 was credited to her loan account.

Q. Mr. Timmins, will you look at the accompanying check stub 2385 and see the reference that is made there?

A. Check No. 2385 dated 7/20/53 in the amount of \$5,000.00 payable to Salinas Valley Ice Co., Ltd., and the explanation is—“To purchase tomato shed on West Lake Street”, and in parenthesis “Lou”—that is referring to me—“Please check with Elwood on this as to the actual ownership”—end of [20] parenthesis.

Mr. Shapro: Anything else, Mrs. Scarbrough?

Mrs. Scarbrough: That is all I had found out. Do you know of anything else, Mr. Timmins?

Mr. Timmins: I know of nothing as far as rental payments, because all this took place after the time I had been retained. As far as entries regarding the purchase of the shed and as to the ownership of the shed, all of those entries have been covered by me in my former comments.

(Testimony of Louis Timmins.)

Mr. Beadle: I would like to suggest this; it might help a lot to show the depreciation, if there was any depreciation of the shed taken by the partnership.

Mr. Shapro: I can't see the materiality of it.

Mr. Beadle: If it was their shed you would expect them to take some depreciation.

Mr. Shapro: I can't see where it would be helpful.

The Court: As far as the Court is concerned the matter is submitted, unless some of the parties have something else.

Mr. Shapro: We are always at a disadvantage when counsel doesn't appear,—and I think it would be fairest to all persons concerned to submit the matter in this way—Mrs. Scarbrough is not, shall we say, trained in the law at least—suppose I write your Honor a letter and point out the Trustee's views; and then your Honor could grant Mrs. Scarbrough such time as is necessary to submit a contrary argument.

Mrs. Scarbrough: May I ask Mr. Timmins while he is here [21] if at any time the Ship Shape Packing Company took that shed as their own personal property while they had it on the books; did they take it for their own, or did you just hold it for me till it would be transferred into my name?

Mr. Timmins: The record on the check stubs made no allusion to who owned the shed,—as it says in the book notation to check with Mr. Scarbrough as to the actual ownership; and it wasn't until a

(Testimony of Louis Timmins.)

later date, namely, November 27th, that through information which I had gained through Mr. Scarbrough or his employees, that on the basis of that information we made this entry, which we believed, and we do believe to be a correct entry; we would not have made it otherwise, of course.

Q. And that credits the shed to me—that shows me as the owner of the shed?

Mr. Shapro: I object to that "owner of the shed."

A. May I answer it this way: The record shows that the money which had been advanced by you and credited to a certain account, namely, the loan account, was later used for the purchasing of that shed.

Mr. Shapro: May I ask one question?

The Court: Well, the Court is aware, I think, of the fact that the \$4,000.00 wasn't in there all the time. Mr. Shapro, if I give you fifteen days—?

Mr. Shapro: Ten days will be all right.

The Court: And Mrs. Scarbrough, you will receive a [22] copy of the letter that Mr. Shapro sends to the Court, and then if you need legal advice you contact someone, and have a reply written to me within ten days after you receive a copy of Mr. Shapro's letter. Submitted 10 and 10. Let the record show that the Court has the Exhibits in the Scarbrough matter. [23]

[Endorsed]: Filed May 1, 1957. Bernard J. Abrott, Referee in Bankruptcy.

BANKRUPT'S EXHIBIT No. 1

Vol. 886, Page 139

JOINT TENANCY DEED

This Indenture, made the fourteenth day of August, one thousand nine hundred and fifty-two, between W. E. Scarbrough, the party of the first part, and Warren E. Scarbrough and Mary Scarbrough, the parties of the second part,

Witnesseth: That the said party of the first part, in consideration of the sum of Ten and no/100 dollars, lawful money of the United States of America, to him in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, and sell unto the said parties of the second part, in joint tenancy and to the survivor of them, and to the heirs and assigns of such survivor forever, all that certain lot, piece or parcel of land situate in the City of Watsonville, County of Santa Cruz, State of California, and bounded and described as follows, to wit:

Being Lot 18, as the same is shown upon the map entitled "Amended Map of W. H. Weeks Subdivision of a part of the City of Watsonville," filed for record in the Office of the County Recorder of said Santa Cruz County February 23, 1905, in Map Book 15, at page 2.

Together with the tenements, hereditaments, and appurtenances thereunto belonging or appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof.

To Have and to Hold the said premises, together with the appurtenances, unto the said parties of the second part, as joint tenants, and not as tenants in common, with right of survivorship, and to the heirs and assigns of such survivor forever.

In Witness Whereof the said party of the first part, has executed this conveyance the day and year first above written.

/s/ W. E. SCARBROUGH.

State of California
County of Monterey—ss.

On this 27th day of August in the year of our Lord one thousand nine hundred and fifty-two, before me, Geo. D. McMillan, a Notary Public in and for the said County of Monterey, State of California, residing therein, duly commissioned and sworn, personally appeared W. E. Scarbrough, known to me to be the person described in and whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In Witness Whereof I have hereunto set my hand and affixed my official seal in said County of Monterey the day and year in this certificate first above written.

[Seal] /s/ GEO. D. McMILLAN,
Notary Public in and for the County of Monterey,
State of California. My commission expires
May 9, 1956.

Beadle Sep. 25, 8:25 a.m., 1952., Vol. 886, Page 139,
Official Records Santa Cruz County. Lela E. Swasey,
Recorder.

Admitted in Evidence March 22, 1957.

BANKRUPT'S EXHIBIT No. 2

DECLARATION OF HOMESTEAD BY HUSBAND

Know All Men by These Presents: That I, Warren E. Scarbrough, do hereby declare that I am the head of the family; that I am married, and the name of my wife is Mary Scarbrough; that my family consists of my said wife and two minor children, Susan Scarbrough and Frank Scarbrough.

That I am, at the time of making this declaration, actually residing, with my family, on the premises hereinafter described, and that I claim said premises as a homestead.

The premises so claimed by me are the real property situated in the County of Santa Cruz, State of California, described as follows:

Being Lot 18, as the same is shown upon the map entitled "Amended Map of W. H. Weeks Subdivision of a part of the City of Watsonville", filed for record in the Office of the County Recorder of said Santa Cruz County February 23, 1905, in Map Book 15, at page 2.

Together with the dwelling-house thereon, and its appurtenances.

That I estimate the actual cash value of said premises to be \$23,000.

That no former declaration of homestead has been made.

In Witness Whereof, I have hereunto set my hand this 27th day of August 1952.

/s/ WARREN E. SCARBROUGH.

Warren E. Scarbrough.

State of California

County of Monterey—ss.

On this 27th day of August 1952, before me, the undersigned, a Notary Public in and for the County of Monterey, State of California, personally appeared Warren E. Scarbrough, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] /s/ GEO. D. McMILLAN,

Notary Public in and for the County of Monterey,
State of California. My commission expires
May 9, 1956.

12000—Recorded at request of Philander Brooks Beadle Sep. 25, 8:27 a.m., 1952, Vol. 886, Page 141, Official Records Santa Cruz County. Lela Swasey, Recorder.

Admitted in Evidence March 22, 1957.

BANKRUPT'S EXHIBIT No. 3

GRANT DEED

We, J. J. Crosetti and W. E. Scarbrough (also known as Warren E. Scarbrough), doing business under the firm name and style of J. J. Crosetti Company, a partnership, J. J. Crosetti, individually, and Theresa M. Crosetti, his wife, W. E. Scarbrough, individually, and Mary Scarbrough, his wife, grant to W. E. Scarbrough all that real property situated in the City of Watsonville, County of Santa Cruz, State of California, described as follows:

Being Lot 18, as the same is shown upon the map entitled "Amended Map of W. H. Weeks Subdivision of a part of the City of Watsonville", filed for record in the Office of the County Recorder of said Santa Cruz County February 23, 1905, in Map Book 15, at page 2.

[Marginal Note: No taxable consideration.]

Witness our hands this 12th day of April, 1952.

J. J. CROSETTI COMPANY,

A Partnership,

/s/ By J. J. CROSETTI

J. J. Crosetti

And /s/ W. E. SCARBROUGH

W. E. Scarbrough

/s/ MARY SCARBROUGH

Mary Scarbrough

/s/ J. J. CROSETTI

J. J. Crosetti

/s/ W. E. SCARBROUGH

W. E. Scarbrough

/s/ THERESA M. CROSETTI

Theresa M. Crosetti

State of California

County of Santa Cruz—ss.

On this 12th day of April in the year one thousand nine hundred and fifty-two before me, Irene Davis, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared J. J. Crosetti, individually, and Theresa M. Crosetti, his wife, W. E. Scarbrough (also known as Warren E. Scarbrough), individually, and Mary Scarbrough, his wife, known to me to be the persons described in and whose names are subscribed to the within instrument and acknowledged to me that they executed the same.

In Witness Whereof I have hereunto set my hand and affixed my official Seal at my office in said County the day and year in this certificate first above written.

[Seal] /s/ IRENE DAVIS,

Notary Public in and for said County and State.

My commission expires June 10, 1955.

State of California

County of Santa Cruz—ss.

On this 12th day of April in the year one thousand nine hundred and fifty-two before me, Irene Davis, a Notary Public in and for the County of Santa Cruz, State of California, residing therein, duly commissioned and sworn, personally appeared

J. J. Crosetti and W. E. Scarbrough (also known as Warren E. Scarbrough), known to me to be the partners of the partnership that executed the within instrument, and acknowledged to me that such partnership executed the same.

In Witness Whereof I have hereunto set my hand and affixed my official seal in the County of Santa Cruz the day and year in this certificate first above written.

[Seal] /s/ IRENE DAVIS,

Notary Public in and for the County of Santa Cruz,
State of California. My commission expires
June 10, 1955.

4623 — Recorded at request of Penniman Title Co. (Santa Cruz County) Apr. 17, 2:40 p.m., 1952, Vol. 865, Page 55, Official Records Santa Cruz County. Lela E. Swasey, Recorder.

[Title of District Court and Cause.]

HEARING ON MOTION TO DISMISS TRUSTEE'S PETITION

Before Hon. Bernard J. Abrott, Referee in Bankruptcy, in Room A, Civil Auditorium, on July 12, 1957.

Appearances: Arthur P. Shapro, Esq., of the law firm of Shapro & Rothschild, 155 Montgomery Street, San Francisco 4, Calif., for the Trustee. Loyd W. Carter, Esq., of the law firm of Carter,

Terreo & O'Connell, 1095 Market Street, San Francisco 3, Calif., for the Respondent, Mary Scarbrough.

San Jose, California, July 12, 1957. 3:00 o'clock p.m.

The Court: In the Matter of Warren E. Scarbrough; Motion to Dismiss Trustee's Petition.

Mr. Shapro: Before the Motion is presented I would like to suggest to the Court and Counsel that the record should be supplemented in one respect. In support of his Motion Mr. Carter has filed an Affidavit admitting the fact that the packing shed was destroyed by fire on May 1st, 1957. However, in his Motion he has said nothing about it, and therefore the record, in my opinion, is defective in that it does not indicate that the shed in question was insured against fire by the Trustee. I am going to ask Mr. Carter either to stipulate to that, or I will offer evidence on the subject because I want the record to show that the subject matter of this petition was covered by fire insurance amounting to \$6,000.00. Now in addition, if Mr. Carter wants to show some other type of insurance I have no objection.

Mr. Carter: I might state,—this is preliminary to the Motion,—as your Honor would know from looking at the Notice of Motion that it is based on the fact that under the present state of the pleadings the question would become moot because Ship Shape asks for an order to sell free and clear of liens; it wouldn't be a case of controversy because

the Court would [1]* lose jurisdiction at the property having been destroyed. Now I shouldn't question at all that the Court would have jurisdiction if this insurance policy is a part of the record; it has proceeds, and I think it is clear that its proceeds follow the property. The Court could properly determine if we have any rights in the insurance policy; I have no objection to that.

Mr. Shapro: That is all I wanted. All I wanted to do was to show that at the time of the fire there was in force, covering the specific property against which action is sought to be dismissed in this Motion—namely, the packing shed—a policy of fire insurance issued April 1, 1957, for a term of three years commencing April 1, 1957, and the amount of the coverage was \$6,000.00. Now this particular property, (I mean the shed) was destroyed by fire on May 7th, wasn't it?

Mr. Carter: On or about that.

Mr. Shapro: Actually, it was during the period that this policy was in force; in other words, your date is off six or seven days. In any event, for the purposes of the record, there was in force a fire insurance policy issued at the instance of the Trustee, and I am not offering that for any other purpose than to show that it was issued in the name of the Trustee—not on the merits at all.

Mr. Carter: If it is offered as evidence that the Trustee thought he was the owner of it—— [2]

Mr. Shapro: No.

Page numbers appearing at top of page of Reporter's Transcript of Record.

Mr. Carter: Is it offered for the purpose of amending the pleadings?

Mr. Shapro: No; it is offered solely in opposition to your Motion. You say the shed was destroyed by fire, which I admit. I also want to show that it was insured at that time for the estate.

Mr. Carter: For a limited purpose, your Honor.

(Followed by discussion off the record.)

The Court: But you do accept the statement that the premises were insured by the Trustee, without prejudice to your client's rights?

Mr. Carter: For the record: Just to say the property was insured by the Trustee—I don't think I have any objection. We will stipulate then, even though the record fails to set it forth, that the premises were destroyed by fire.

Mr. Shapro: Yes.

Mr. Carter: Also, summarily for turn-over proceedings, that both parties had the building insured.

The Court: Without prejudice to your client's rights.

Mr. Carter: Yes.

Mr. Shapro: I think I can save both your Honor's time and Mr. Carter's, by making this observation: I don't quarrel in any way with the authorities that Mr. Carter has cited in support of his Motion; I merely want to point out to Your Honor [3] that, if it becomes moot, it is not a substantial part of the controversy, and it is the Court's duty to dismiss the petition. I concede that to be the law and, therefore, to present a new motion would

not be necessary. I merely want to introduce it to show that the subject matter is not moot.

Mr. Carter: I don't think there is any question in the law if it is mooted—

Mr. Shapro: I say it is not moot,—and if you want to argue that it is, if your Honor will examine the Trustee's Petition to Sell the Property Free and Clear of Liens you will find the allegation that this packing shed is an asset of this estate (Page No. 1, Trustee's Petition for Leave to Sell Personal Property Free and Clear of Liens, in the second paragraph, among the assets). And your Honor, by reading the third paragraph on that page, will realize that the Trustee has asserted "that Mary Marie Scarbrough claims an interest in or a lien upon the above described personal property, the exact nature, extent and/or validity of which said claim is unknown to your Petitioner, but which said purported claim of lien or interest therein your Petitioner verily believes and therefore represents to be invalid as against your Petitioner, as such Trustee." Then we ask in the prayer for an Order authorizing the Trustee to sell said personal property free and clear of any lien, claim, right, or interest therein whatsoever in favor of said Mary Marie Scarbrough, [4] and for an Order requiring her to file and propound herein under oath, within such time as this Court may specify, such claim of lien or interest as she may have or assert against the said personal property, and that thereafter due hearing be had to have this Court determine the nature, extent and/or validity of such

claim. Now, Mrs. Scarbrough filed an Answer—

The Court: It was filed February 6th.

Mr. Shapro: Yes, your Honor,—in which she sets forth the fact that she bases her claim—I am reading Paragraph III: “That said lien of this respondent is a first lien upon said personal property”. And in the prayer she prays “for an order finding the validity, extent, and priority of her said lien and directing the sale of said personal property free and clear of all liens and interests and the transfer of her lien to the proceeds thereof, and for such other and further relief as is just”. Now on those issues, your Honor, the case was tried; it was submitted on the memorandums to be filed, but before they were all in—(the last one is in now) but before they were all in, the fire occurred.

Now we take the position, if your Honor please, that the Petition for Leave to Sell is only one of the means, summary means available for a Trustee to have claims to property in the possession of the Bankrupt at the time of the petition determined by the Court. Mrs. Scarbrough claimed a lien or interest, and we asked that she propound it, [5] and that when she did that, that the Court, after due hearing, determine the validity of it. Mrs. Scarbrough did so propound her alleged claim; we tried the case on the issues involved on the theory that it all relates to the property at the time of the petition, which was then in existence,—the subject of her lien, whether it was a valid lien or not; the destruction of the subject matter by fire would

not make this a moot question unless there were no insurance—if there were no insurance I would agree. It is not a question of ownership, because ownership is conceded. It is a question of lien rights. Mrs. Scarbrough said she intended to get title, but confessed she had not; she thought she had a lien because she paid the purchase price, and also spent some money to improve the shed.

Referring only to the pleadings now on that basis, the real issue is whether or not at the time of the filing of this petition Mary Scarbrough had a valid and subsisting lien on this shed. As counsel said a few moments ago, this Court would obviously have the right and the jurisdiction to determine the controversy over the property, namely, the proceeds of the insurance policy covering the property. On that basis, to dismiss the petition as Counsel asks, woud not avoid a multiplicity of actions but rather encourage such, because somebody would have to collect the insurance. If we got it, Mr. Carter would have to try the case again on the same basis. [6]

Mr. Carter: But not in this Court.

Mr. Shapro: The answer would be, if this is dismissed and we collect the \$6,000.00 which is obtainable only under this policy, Mr. Carter's client would have to come in here and try again the same thing. There is no lien; that issue is just as alive today as it was a minute before the fire. The shed was destroyed by reason of the fire, and by reason of the fact that there was a fire insurance coverage before the fire occurred, it would be subject to the jurisdiction of this Court.

Mr. Carter: I will stipulate that this Court make an Order that not only the question of a sale free and clear is moot, but that Mrs. Scarbrough has no interest whatsoever in the policy of fire insurance taken out by the Trustee, because the cases clearly hold that an adverse claimant cannot claim an interest against the Trustee's property, because he simply insures his insurable interest. I submit, if I may go back now to try to pick up the argument—and going back to my own motion, primarily there was no apparent question; I concede the record not having made mention of the policy; that the shed in question was in the possession of the Trustee, and that this Court has the exclusive jurisdiction to determine the rights of lien claimants, and the Trustee's rights in that property. However, before the matter was decided, the personal property was destroyed and is now completely out of existence. Now it is not urged that there [7] is any jurisdiction of this Court except that there was certain physical property in the possession of the Trustee.

Mr. Shapro: I disagree; I only wanted to call attention to the fact that Mr. Carter's statement is incorrect because I have stated—and he has stated the same thing—that although the property was destroyed since it was insured by the Trustee, this Court has jurisdiction to determine the same questions in connection with the insurance money that it would, and could have determined in connection with the property,—having in mind, Mr. Carter, that the insurance proceeds follow the property.

Mr. Carter: In this case there is only one issue before the Court, and both parties have asked for the same thing,—that is, that the Court make an order authorizing the Trustee to sell the property free and clear—

Mr. Shapro: No—read the Answer.

Mr. Carter: Mr. Shapro, let me finish completely. Both Mr. Shapro's pleadings and Mrs. Scarbrough's, in propria persona, ask for one thing; that this Court authorize the sale of this property free and clear of liens; both ask for the determination of the validity or right of her lien—she does claim a lien.

The Court: It is difficult to find out whether she claims a lien or—

Mr. Carter: This is the issue: Should the Court make an Order selling this property free and clear of liens, [8] and second, determine to what extent she may have a lien on the proceeds. I submit that when the personal property was destroyed by fire that the Court lost summary jurisdiction,—that there is nothing left for the Court to decide. Now, if there are no proceeds left to the Trustee—if he wishes to throw this out completely and to amend his pleadings to determine that Mr. Scarbrough has no interest in the insurance policy, I will stipulate to that, because I don't think we have any interest in the Trustee's policy; but if he wants to amend his pleadings, first he has to have an Order authorizing him to sell free and clear.

Mr. Shapro: I don't want that; I want the Court to determine—if I may answer now—he says

there are two things we asked for. We asked—both sides asked for an Order; in our case, authorizing and directing the sale of personal property—that is moot—

Mr. Carter: That is moot,—the pleadings as they are now.

Mr. Shapro: Yes, and if one point is moot, the Court can still grant the other through the Order determining the right, title, or interest that Mrs. Scarbrough may claim against the property. She asks the same thing, asks it be determined as a first lien. I think the Trustee is entitled, certainly the Trustee is entitled to have your Honor make a finding on the basis of the evidence before the Court which is now here on Mr. Carter's motion, with her Affidavit, and with the question of insurance here,—make findings that the [9] property may or may not be subject to the lien; that it was destroyed by fire; that there was insurance, and that she either has or has not a lien on the proceeds of the insurance for the satisfaction of her lien.

The Court: Suppose that Mr. Carter stipulates that Mrs. Scarbrough would make no claim whatever on it?

Mr. Shapro: That is not satisfactory. I will tell you why—

Mr. Carter: It is very—

Mr. Shapro: The Judge asked me a question; I am trying to answer. I will withhold then until Counsel finishes his argument.

Mr. Carter: It is very apparent why this is not satisfactory other than the stipulation that we have no interest in his policy because they took it out and there is no insurable interest.

Mr. Shapro: That is why I say it has to be determined upon the pleadings at this moment.

The Court: You are in court now.

Mr. Carter: It is moot for this reason: The Trustee takes out an insurance policy; any question of that policy is between him and his client,—not mine. It may be a question between my client and her company about her insurable interest, but I say the question here is moot because there is no controversy on the question of lien, which is what I object to; he says he just wants the record to show that there was insurance. [10]

Mr. Shapro: That is right.

Mr. Carter: But there is nothing in the evidence, nothing in the pleadings, and nothing in the prayer that would give this Court jurisdiction to determine that we cannot sell it free and clear, and that you have no lien upon the proceeds of the policy—it is simply moot.

Mr. Shapro: It is a maxim of law with which your Honor is very familiar, and one that counsel is just conceding—that the Court may make any judgment and grant any relief which to him appears just and in accordance with the evidence, and there is a prayer in the petition which is sufficient on the question of why I don't want to accept the stipulation. If we stipulate that he claims his client has no interest in this, that is not the

finding which I urge upon your Honor to make—that this property was the property of the bankrupt estate at the time of filing the petition, regardless of whether Mrs. Scarbrough had a lien, because she has insured this property for \$20,000.00. I don't want to be put in the position that, because he claims it, it has to be heard in another court. I would have to go and fight two suits.

Mr. Carter: You have to, anyway, Mr. Shapro.

Mr. Shapro: No, I don't, if I get a finding in this Court today; not on the question of whether this is moot or not, but if I get a finding that I am entitled to try the issues, and that this shed, at the time of filing the petition by the [11] bankrupt was in his possession and thereafter was insured by the Trustee for \$6,000.00, and that Mrs. Scarbrough had no lien or interest in the shed, therefore no interest in the insurance proceeds, I will get \$6,000.00 whether you sue or don't sue.

Mr. Carter: That is just why we are fighting this issue. I dispute what Mr. Shapro says, that there isn't any binding lien upon the property whether it was destroyed by fire or not. Even though it is apparent that both parties have insured, they can only insure their insurable interest. That is why I say I will stipulate that she has no interest in the insurance policy of the Trustee—I don't think I have to do that.

Mr. Shapro: I don't accept the stipulation.

The Court: The Court accepts that. Submitted, gentlemen?

Mr. Carter: There is one statement that Mr.

Shapro made—I hope I got it right; that is, he said his argument is based on the fact that at the date of bankruptcy the personal property did exist and was in the custody and control—

Mr. Shapro: And was owned by the bankrupt estate.

Mr. Carter: —as of the date of bankruptcy, and as of the date that these proceedings started the property was in existence and was in the possession of this Court, and therefore that this Court can entertain jurisdiction; that subsequently it was destroyed, but the fact of its being destroyed wouldn't in any way affect these proceedings. [12]

The Court: At the beginning of your statement, the first part of the proceedings, I thought you were going to arrive at a point where Mr. Shapro was stipulating to certain facts,—before you started a discussion.

Mr. Shapro: If you want a stipulation that at the time of filing bankruptcy the packing shed was in existence and subject to the jurisdiction of this Court—

Mr. Carter: I just wanted to refer back to Mr. Shapro's statement, and to make the comment that the very destruction of the personal property which is the subject of this proceeding—the fact that it was destroyed leaves your Honor without jurisdiction to make the Order; that is the very basis, and the reason that the Court loses jurisdiction,—the destruction of the property.

Mr. Shapro: It was offered simply to show that it was in existence—it is offered to you.

Mr. Carter: If it is offered as an amendment I will object to that.

Mr. Shapro: I am not asking for any amendment at all.

The Court: Submitted.

[Endorsed]: Filed September 23, 1957. Bernard J. Abrott, Referee in Bankruptcy. [13]

[Endorsed]: No. 16197. United States Court of Appeals for the Ninth Circuit. J. M. Dungan, Trustee in Bankruptcy of the Estate of Warren Elwood Scarbrough, Bankrupt, Appellant, vs. Warren Elwood Scarbrough, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: September 22, 1958.

Docketed: September 27, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 16197

J. M. DUNGAN, Trustee of the Estate of Warren
Elwood Scarbrough, Bankrupt,

Appellant,

vs.

WARREN ELWOOD SCARBROUGH,

Appellee.

APPELLANT'S CONCISE STATEMENT OF
POINTS URGED ON APPEAL

Comes now J. M. Dungan, Appellant herein, and in accordance with Rule 17(6) of the Rules and Practice of the U. S. Court of Appeals for the Ninth Circuit, specifies the following as a concise statement of the points on which he intends to rely on this appeal from the Order made and entered by Hon. Louis E. Goodman, Chief Judge, U. S. District Court, for the Northern District of California, on the 30th day of June, 1958, more particularly specified and described in Notice of Appeal heretofore filed with the Clerk of said District Court on the 8th day of August, 1958, as follows:

1. That said Order was not supported by the evidence and is contrary to the law in that:

(a) The District Court in said Order erred in finding that the respondent was entitled to a homestead exemption in the amount of \$12,500.00.

(b) The District Court in said Order erred in holding that said homestead exemption could not be apportion.

(c) The District Court in said Order erred in holding that said Trustee could not sell the respondent bankrupt's undivided one-half interest in the homesteaded property.

Dated: This 3rd day of October, 1958.

SHAPRO & ROTHSCHILD,

/s/ By ARTHUR P. SHAPRO,

Attorneys for J. M. Dungan, Trustee of the Estate
of Warren Elwood Scarbrough, Bankrupt, Ap-
pellant.

Certificate of Service by Mail Attached.

[Endorsed]: Filed October 6, 1958. Paul P.
O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD ON APPEAL

Appellant sets for the following as a designation of all of the record which is material to the consideration of this appeal.

1. The entire transcript of the record, proceedings and evidence as set out in the Referee's Certificate on Petition for Review of Order Authorizing Trustee's sale of real property dated the 6th day of May, 1958.
2. All of the original documents transmitted with

said Referee's Certificate on Petition for Review, less items Nos. 9, 10, 11 and 12.

3. That certain Order Vacating Order of the Referee made and filed on June 30, 1958 by Hon. Louis E. Goodman, Chief Judge, U. S. District Court, Northern District of California.

4. Designation of contents of record on appeal filed in the United States District Court, Northern District of California, on August 8, 1958.

5. Notice of Appeal filed in the U. S. District Court, Northern District of California, on August 8, 1958.

Dated: This 3rd day of October, 1958.

SHAPRO & ROTHSCHILD,
/s/ By ARTHUR P. SHAPRO,
Attorneys for J. M. Dungan, Trustee of the Estate
of Warren Elwood Scarbrough, Bankrupt.

Certificate of Service by Mail Attached.

[Endorsed]: Filed October 6, 1958. Paul P.
O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF ADDITIONAL RECORD ON APPEAL

Appellee designates that the following additional documents be included in the record on appeal in the above proceeding:

1. Original documents Nos. 9, 10, 11 and 12 transmitted with the Referee's Certificate on Petition for Review of Order Authorizing Trustee's Sale of Real Property.

Dated: October 9, 1958.

PHILANDER BROOKS BEADLE,
Attorney for Warren Elwood Scarbrough, Appellee.

[Endorsed]: Filed October 13, 1958. Paul P. O'Brien, Clerk.